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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 319

RICHARD W. CROUGHAN,

Petitioner,

v.

MICHAEL J. MURPHY, Police Commissioner of the City of New York.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

Rather than controvert the merit of the constitutional issues raised by petitioner in his petition for certiorari, respondent instead has, in the main, resorted to an unneeded recital of the 11 specifications of moonlighting, which petitioner had already admitted, and which are not germane to the issuance of the writ. Apparently, respondent hopes that this restatement of the charges will somehow paint petitioner as a hardened offender and persuade this Court that he should not have relief for the clearly demonstrated violations of his constitutional rights. Whether such an evasive tactic be to avoid a confrontation on the real issues of this case or the result of a misunderstanding of the constitutional questions presented, it demands reply.

POINT I

The 11 specifications of which petitioner was found guilty constitute nothing more than moonlighting.

To counteract respondent's tactic and to demonstrate that the eleven specifications concerning which petitioner either admitted his guilt or was found guilty constitute nothing more than a basic charge of moonlighting as a lawyer, the same incidents stated and restated in every way imaginable, increasing the number of specifications in an attempt to increase its severity, we proceed to a succinct analysis of each.

Specification 1

Charged petitioner with being engaged in another occupation, namely, being employed as a law clerk. Petitioner admitted this.

Specification 2

Charged petitioner with being engaged in another occupation, namely, acting as an attorney. Petitioner admitted this.

Specification 3

Found that petitioner while engaged in this other occupation, namely, as an attorney, had his name in a firm title. This is no different in substance than the prior charges. He simply moonlighted as an attorney.

Specification 4

Charged petitioner with soliciting and accepting legal business. Petitioner was found guilty of accepting legal business but not guilty on all the specifications of solicitation. Thus this finding is nothing more than moonlighting.

Respondent's brief (pp. 3-4) refers to the *Sullivan* case as a finding of solicitation. As pointed out in the petition for a writ, this single finding of solicitation, was never charged, never specified and never added to the charges or specifications and the finding of solicitation in this case is thus in contravention of *Re Ruffalo,* 390 U. S. 544 (1968).

There is no important distinction between this specification and the previous ones because the clients here are described as other police officers. As petitioner himself was a police officer, most of his clients were fellow officers, and the clients referred to in all specifications are all one and the same. The same offense is alleged just a little differently.

Specification 5

Found that petitioner, as part of his engagement in another occupation, as an attorney, filed statements of retainers with the Judicial Conference on contingent fee cases. It must be noted that this is mandated by the Rules regulating lawyers in New York State (Rule IV, Part Three of the Rules of the Appellate Division, Second Department) and the act of filing these statements was in and of itself no violation of any rule and regulation of the Police Department, but only a further exhibition of petitioner's moonlighting as a lawyer. This charge is thus no different from the previous ones.

Conversely, if petitioner had failed to file these retainer statements to avoid Police Department scrutiny, he would have been subject to disciplinary action as a lawyer. But petitioner did not try to hide his moonlighting as a lawyer; yet one of his otherwise innocuous acts, the filing of retainers as required by law, becomes the subject of a separate specification. It should not have been alleged as a separate specification—the wrong committed by petitioner was singular, he moonlighted.

Specification 6

Charged petitioner with soliciting and accepting legal business. He was found guilty of accepting legal business but not soliciting. It is again simply another statement of the basic moonlighting charge.

Specification 7

Found that petitioner recommended other officers to the law firm with which he moonlighted. There is no substantive difference in this charge, just another way of stating the basic charge of moonlighting.

Specification 8

Found petitioner guilty of conflict of interest because of his moonlighting. This finding will be analyzed in depth in Point III of this brief.

Specification 14

Found petitioner guilty of getting paid for his moonlighting as a lawyer.

Specification 15

Charged petitioner with using Police Department property and buildings for other than official business, that is, he received a couple of telephone messages at the stationhouse from clients concerning his moonlighting cases.

Specification 16

Charged petitioner with moonlighting in one particular instance, for which the firm received a fee.

POINT II

The arguments advanced by respondent, in answer to the first reason presented in the petition for a writ of certiorari, do not pass constitutional muster.

The first reason for granting the writ stated by petitioner was that the single finding of solicitation of legal business (the *Sullivan* case) violated the mandate of this Court in *Re Ruffalo,* 390 U. S. 544 (1968). This was for the reason that the *Sullivan* case was never charged as solicitation, never specified, was not included in the Bill of Particulars, and was rejected at the hearing when the trial prosecutor attempted to add it as such (Petition, pp. 7-8).

Respondent's answer concedes this:

> "The petitioner was specifically charged with the solicitation of legal business under Specification 4. In the bill of particulars under this Specification 4, the Sullivan matter was not included. . . .
>
> "Specification 8, under which the Sullivan instance was listed, did not use the word 'solicitation'." (Respondent's Brief, p. 9)

Nevertheless, respondent advances three arguments why this single finding of solicitation was justified. First respondent argues that:

> "The *Ruffalo* case does not aid the petitioner herein unless it be treated as holding that a charge may never, regardless of the circumstances, be amended during the hearing." (Respondent's Brief, p. 9)
>
> * * * *
>
> "It may be argued that, despite the reasoning of the majority opinion in Ruffalo, it stands for the principle that charges may never be amended after they are served and the proceeding commences." (Respondent's Brief, p. 10)

This reasoning is specious. for it ignores the stark fact that not only was the charge not amended during the hearing to include the *Sullivan* case as solicitation, the attempt at such an amendment was specifically rejected by the hearing officer. The problem here is that the findings were somehow turned to include the *Sullivan* matter as a solicitation, although petitioner was specifically put on notice, by the denial of respondent's motion to amend the charge to include the *Sullivan* case as a solicitation, that he would not have to defend against it as such.

The second argument advanced by respondent can only be understood as urging the proposition that petitioner should have guessed he might have been charged with solicitation in the *Sullivan* case, although the charges, specifications and the Bill of Particulars served by respondent did not state it as such. Respondent justifies it this way:

> "It is submitted that the principle of *Ruffalo* does not apply to a situation where the person charged is not only aware by its very nature of the impropriety of the act but also has been *charged in a somewhat similar respect with the very act in question. . . .*" (Respondent's brief, p. 9) (emphasis added.)

How does this argument square with the decision of *Ruffalo?* The act with which *Ruffalo* was charged was solicitation, thus he was aware of its impropriety, and it was the proof offered on the solicitation charge that served as the basis for the constitutionally rejected finding against him, namely, that he hired the investigator of the railroad to investigate the FELA claims. He was thus charged in a somewhat similar respect with the very act in question.

It must be remembered that in the instant case the charges were served in December, after a prior investigation, and the hearing did not proceed until March. Dur-

ing all that time all the facts of the *Sullivan* matter were available to respondent and he did not consider it as a solicitation nor did he charge it as such. It was only for the first time at the hearing, after the witnesses on the matter had finished testifying as to the charge of conflict of interest (Specification 8), that the respondent chose to try to amend Specification 4 to include *Sullivan* as a solicitation charge. This was rejected by the hearing officer. Now that the hearing officer has erroneously incorporated it as his only finding of solicitation, respondent attempts to justify it with the argument that petitioner could have guessed it because he had "been charged in a *somewhat similar* respect with the very act in question. . . ."

Finally, respondent argues that *Ruffalo* was not violated because in his opinion: "Fair play was not violated in the present case." (Respondent's brief, p. 10). It is hard to imagine a situation more unfair than this, where petitioner was found guilty of a crime with which he was never charged. All notions of fair play were violated when petitioner was lulled into the position of not defending the *Sullivan* matter as a charge of solicitation and then finding himself declared guilty of that very offense.

POINT III

Respondent has no valid answer to petitioner's claim that he was found to have violated a rule and regulation not promulgated until nearly a year after the alleged commission of the offense.

Respondent concedes in his brief (pp. 11-12) that R. & P. 2/35.0 of the Rules and Regulations of the New York City Police Department was not promulgated until nearly a year after its alleged violation. But respondent argues that this is unimportant because this Rule and Regulation was only "at most surplusage and a repetition of what

was already the subject of formulation and provision in Rules 2/24 and 2/63.2." (Respondent's brief, p. 12). Respondent further argues that petitioner could have been otherwise found guilty of a penal offense under the New York City Code of Ethics (Section 898-1.0 of former Administrative Code of the City of New York) which was in effect at that time (Respondent's brief, p. 12).

Beside the very basic fact that petitioner was not charged with a violation of the Administrative Code of New York City (The Code of Ethics), which would raise further questions never considered at the hearing, including the issue of quantum of proof, it is even questionable whether the Police Department itself considered its members covered by the Code until the publication of General Orders No. 22, on June 8, 1962. In his brief, respondent has set forth the portions of General Orders No. 22 that became incorporated in the Rules and Procedure of the Department as a result of the order. However, respondent neglected to set out the introductory matter of General Orders No. 22 of June 8, 1962, which clearly raises the question of whether or not the Police Commissioner considered the provisions of the Code of Ethics applicable prior to that time. The language of the Police Commissioner clearly delineates its application as prospective—"shall be applicable"—while here respondent argues its *ex post facto* application. The introductory paragraphs of General Orders No. 22 is set forth for this Court's convenience.

"POLICE DEPARTMENT
CITY OF NEW YORK
OFFICE OF THE POLICE COMMISSIONER

New York, June 8, 1962.

GENERAL ORDERS No. 22.

AMENDMENTS TO THE RULES AND PROCEDURES
CODE OF ETHICS

1. Due to its importance, the content of Local Law No. 73 (Code of Ethics) and Local Law No. 75, both

of 1959, heretofore published in Circular No. 4, s. 1960, is added to the Rules and Procedures. These provisions shall be applicable to all members of the department, except that when any portion of the subject matter appears in a more restrictive manner elsewhere in the Rules and Procedures or orders of the department the more restrictive provisions shall apply to members so affected.

2. Any member of the department who desires to resolve a question of propriety under the Code of Ethics shall submit a request for an opinion, in writing, to the Deputy Commissioner in charge of Legal Matters. An appeal from an opinion rendered may be taken by notice to the Deputy Commissioner in charge of Legal Matters. Upon receipt of notice of appeal, the Deputy Commissioner in charge of Legal Matters shall forward all relative papers to the Board of Ethics of the City of New York.

3. Accordingly, Chapter 2 of the Rules and Procedures is amended as follows:

a. Present paragraphs 35.0 and 36.0 are renumbered 36.0 and 36.1 respectively, and new paragraphs 35.0, 35.1 and 35.2 are added to read:"

If a violation of R. & P. 2/35.0 cannot be sustained because it was not promulgated until nearly a year after the alleged violation, and if a violation of the Administrative Code of New York City (The Code of Ethics) cannot be sustained because either it simply was not charged against petitioner, or it was not applicable until the promulgation of General Orders No. 22, then respondent is left with only one argument to sustain Specification 8, and that is found on page 12 of his brief:

". . . Rule 2/35.0 was at most surplusage and a repetition of what was already the subject of formulation and provision in Rules 2/24 and 2/63.2."

Clearly the gist of Specification 8 was a charge of violating R & P 2/35.0 which is concerned with conflict of interests. The wrong charged in specification 8 is

> ". . . did without just cause place himself in a position where his private interests did conflict with his official police duties, or by reason of which his loyalty to this Department and the City of New York could be impaired, . . ."

Rule 2/24.0, upon which respondent now relies, prohibits a member of the department *"except in transacting personal affairs"* from recommending to a *business person* or informing a *business person* about the services of a lawyer, bondsman, undertaker, towing service, etc. By its very terms Rule 2/24.0 is not applicable here as it exempts "personal affairs" and the very charge of Specification 8 is that petitioner allowed his "private interests" to conflict with his police duties. Rule 2/24.0 is mutually exclusive with R & P 2/35.0 and the very language of Specification 8. Additionally, it is submitted, that Rule 2/24.0 was never intended to cover the situation where one police officer recommends a service to another police officer. Its obvious intent is to proscribe such recommendation to a business person—in dealing with the general public.

Finally respondent relies on Rule 2/63.2. That rule reads as follows:

> "63/2 Members of the department shall carefully avoid behavior that would tend to bring adverse criticism of the department. Their conduct, whether on or off duty, shall be such as to merit the confidence and respect of the people."

Does this rule defining the behavior to be avoided as "that [which] would tend to bring adverse criticism of the department" satisfy constitutional standards against vagueness? In *O'Callahan* v. *Parker,* 395 U. S. 258 (1969),

this Court left open a similar question regarding Article 134 of the Uniform Code of Military Justice. That statute punishes as a crime "all disorders and neglects to the prejudice of good order and discipline in the armed forces." Is there any constitutional difference between that statute and Rule 2/63.2, considered here, which punishes for failure to "carefully avoid behavior that would tend to bring adverse criticism on the department," or for failure to adhere to conduct "whether on or off duty [which], shall be such as to merit the confidence and respect of the people"?

As observed by Mr. Justice Douglas, in his memorandum opinion on the Application for Bail in *Levy* v. *Parker*, October Term, 1969, "substantial issues are presented on the merits."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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JOHN F. HAGGERTY,
of Counsel.

Dated: Brooklyn, New York, September 1, 1969.